Supreme Court, U.S.
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No. 01-1368

IN THE

Supreme Court of the United States

NEVADA DEPARTMENT OF HUMAN RESOURCES, *et al.*,

Petitioners,

v.

WILLIAM HIBBS, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

CHARLES HILSABECK
(*Counsel of Record*)
Deputy Attorney General
STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL
1325 Airmotive Way, Ste. 340
Reno, Nevada 89502
(775) 688-1818

TRACI L. LOVITT
LOUIS A. CHAITEN
JONES, DAY, REAVIS & POGUE
222 East 41st Street
New York, NY 10017
(212) 326-3939

Counsel for Petitioners

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REPLY BRIEF FOR PETITIONER

This case clearly satisfies the standards for granting review. It concerns a recurring federal question—whether 29 U.S.C. § 2612(a)(1)(C) exceeds Congress's enforcement authority under Section 5 of the Fourteenth Amendment—that all concede divides the lower courts. No one contests the importance of this question. And the Ninth Circuit's decision fails to follow the analytical path marked by this Court's Section 5 jurisprudence.

Since the petition was filed, twelve States have filed an *amici curiae* brief that supports these points. In addition, the *amici* demonstrate that the decision below exposes the Ninth Circuit States to the risk of overwhelming litigation: of the Nation's 4.8 million state employees, nearly *one-fifth* are employed in the Ninth Circuit alone, and all may now sue their state employer whenever they object to its leave decisions. (Br. 18). The *amici* brief also powerfully confirms that § 2612(a)(1)(C) was not intended to remedy unconstitutional state gender discrimination. To the contrary, Congress commended the "[a]pproximately 30 States, the District of Columbia and Puerto Rico [that had] adopted some form of family or medical leave." (*Id.* 8).

Failing to contest the circuit split or the significance of the question presented, respondents argue that the split is narrow and attempt to manufacture non-existent "vehicle problems." These arguments are red herrings and should not deter the Court from reviewing the important constitutional issue cleanly presented by this case.

1. Hibbs fails to dispute, and the United States concedes, that this case presents an "important constitutional question—going to the heart of Congress's Section 5 power." (U.S. Opp. 10). The State *amici* (Br. 18) agree. Thus, whether one considers the vantage point of the Federal Government, the States or state employees, the issue in this case is sufficiently important to warrant this Court's review.

2. Respondents do not, and cannot, deny that the lower courts are divided over the question presented. They, and the Ninth Circuit (Pet. App. 5a), acknowledge that *at least* two circuit courts (the Ninth and Fifth) have issued conflicting opinions. (Opp. 20; U.S. Opp. 9).

3. Respondents, instead, argue that the division is limited to these courts and thus is "nascent" and "narrow." (Opp. 18-21; U.S. Opp. 7-11).

a. Respondents cannot articulate, however, why this split is "nascent." In their combined 55 pages of briefing, respondents cannot identify a single legal theory concerning § 2612(a)(1)(C) that the lower courts did not consider in their thorough decisions. Having failed to suggest an alternative reading of the statute that might justify delaying this Court's review, respondents cannot reasonably claim that the courts' analyses will mature over time.

Respondents are wrong to suggest, moreover, that the lack of *en banc* review renders the current division of authority "nascent." (Opp. 21 n.24; U.S. Opp. 10). No court of appeals requires a party to file a petition for *en banc* review before filing a petition for writ of *certiorari*. *Cf.* 10th Cir. R. 35.1(B) (providing that no such filing is required); 11th Cir. R. 35-3 (same). Nor does this Court. To the contrary, the Court *routinely* resolves narrow splits concerning sovereign immunity without the benefit of *en banc* decisions.[1]

b. In addition, there are compelling reasons to decide the question presented now. If the Court were to postpone review, the delay would impose massive litigation costs on the

[1] *See, e.g., FMC v. S.C. State Ports Auth.*, No. 01-46, slip op. (May 28, 2002); *Univ. of Ala. Bd. of Trs. v. Garrett*, 531 U.S. 356 (2001); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997); *Seminole Tribe v. Fla.*, 517 U.S. 44 (1996); *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299 (1990).

States of the Ninth Circuit and, more importantly, would substantially injure their dignity as sovereigns. Nevada respectfully submits that it should not be forced to bear these costs for the sake of undefined "percolat[ion]." (Opp. 18).

c. Presumably due to the importance of sovereign immunity, the Court, just this Term, granted *certiorari* to review an Eleventh Amendment question that implicated *no* split of authority despite the United States' opposition on the same nascency ground it asserts here. *See* Opp. of United States in *FMC v. S.C. State Ports Auth.*, No. 01-46, at 20 (filed Sept. 10, 2001) ("*S.C. State Ports Auth.* Opp."). Indeed, the Court has repeatedly granted *certiorari* to resolve immunity disputes (including disputes that led to *landmark* decisions) where no split of authority existed or where the split was limited to only two circuits.[2]

4. In any event, this split is much deeper than respondents argue. Like the Fifth Circuit, the Sixth Circuit has held that Congress exceeded its enforcement authority under § 2612(a)(1)(C). *See Thomson v. Ohio State Univ. Hosp.*, 238 F.3d 424, 2000 WL 1721038 (6th Cir. 2000); *Sims v. Univ. of Cincinnati*, 219 F.3d 559, 562 (6th Cir. 2000). Respondents refuse to acknowledge the import of *Thomson* because it is unpublished.[3] (Opp. 20; U.S. Opp. 10 n.3). But the court's decision not to publish is explained fully by the fact that its holding was determined completely by earlier precedent. "*Sims* . . . compelled [it] to dismiss" the case "as

[2] *See, e.g., United States v. Morrison*, 529 U.S. 598 (2000); *Alden v. Maine*, 527 U.S. 706, 712 (1999); *Coll. Sav. Bank*, 527 U.S. at 671; *Coeur d'Alene*, 521 U.S. at 266; *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 38 (1994); *Penn. v. Union Gas Co.*, 491 U.S. 1, 6 (1989); *Finley v. United States*, 490 U.S. 545, 547 (1989); *Quern v. Jordan*, 440 U.S. 332, 334 (1979); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 448 (1976).

[3] Contrary to respondents' claim, *Thomson*, although unpublished, has precedential value. (Br. 3 & n.2).

jurisdictionally precluded." *Thomson*, 2000 WL 1721038, at *3. Indeed, by *not* publishing, the court confirmed that *Thomson* did not "establis[h] a new rule of law," but merely applied precedent. *See* 6th Cir. Rule 206(a)(1). A careful reading of *Sims* and *Thomson* demonstrates that respondents' argument mistakenly elevates form over substance. Those opinions make clear that "[i]n the Sixth Circuit, the FMLA is not actionable by private citizens in federal court against a [S]tate." *Thomson*, 2000 WL 1721038, at *3.

The Ninth Circuit's decision also departs from the *standards* adopted by eight courts of appeal and a state court of last resort. (Pet. 8-13; Br. 3). Respondents' only answer to this argument is that these courts were considering a different provision of the FMLA, 29 U.S.C. § 2612(a)(1)(D), which (in their view) remedies disability discrimination and thus is not entitled to the presumption of constitutionality that § 2612(a)(1)(C) supposedly enjoys. (Opp. 18-20; U.S. Opp. 10 n.3, 11). But many of these courts did *not* limit their analysis to § 2612(a)(1)(D). They reviewed the FMLA's entire legislative history, found no evidence of any unconstitutional state conduct, and purported to invalidate the FMLA as applied to States *in its entirety*.[4] And contrary to respondents' suggestion, in *no* case did a court presume that § 2612(a)(1)(D) was only a disability law. Rather, all analyzed § 2612(a)(1)(D) under the Court's gender-discrimination jurisprudence.[5]

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[4] *See Lizzi v. Alexander*, 255 F.3d 128, 138 (4th Cir. 2001), *cert. denied*, 122 S. Ct. 812 (2002); *Townsel v. Missouri*, 233 F.3d 1094, 1096 (8th Cir. 2000); *Sims*, 219 F.3d at 566; *Schall v. Wichita State Univ.*, 7 P.3d 1144, 1161 (Kan. 2000).

[5] *See Laro v. New Hampshire*, 259 F.3d 1, 10 (1st Cir. 2001); *Chittister v. Dep't of Cmty. & Econ. Dev.*, 226 F.3d 223, 228 (3d Cir. 2000); *Lizzi*, 255 F.3d at 134; *Garrett v. Univ. of Ala. Bd. of Trs.*, 193 F.3d 1214, 1228 (11th Cir. 1999), *rev'd on other grounds*, 531 U.S. 356 (2001).

5. Respondents also err by suggesting that Nevada's petition is an impermissible interlocutory appeal (or as Hibbs claims, is "unripe"). (Opp. 11; U.S. Opp. 15-16). It is beyond question that when a court denies a sovereign immunity claim the State has a *right* to an interlocutory appeal regardless of the nature of future proceedings. *See Vt. Agency of Natural Res. v. United States*, 529 U.S. 765, 770 n.2 (2000); *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 145-46 (1993). The supposedly contrary authority cited by respondents (Opp. 11; U.S. Opp. 16) is unpersuasive because it either predates *Puerto Rico Aqueduct*, which definitively decided the issue, or has *nothing* to do with an appeal of a sovereign immunity claim. In any event, the potential for further proceedings does not militate against granting the writ as this Court *frequently* reviews cleanly presented legal issues at an interlocutory stage.[6]

6. The United States is also wrong to suggest that, because the recent decision in *Ragsdale v. Wolverine World Wide, Inc.*, 122 S. Ct. 1155 (2002), may undercut Hibbs' claims, the Court may "avoid" the constitutional question here by denying the writ and allowing the lower court to decide the claims' merit. (U.S. Opp. 12-15).

a. At the outset, this theory of constitutional avoidance is unfounded here because the theory's proponent, "takes no position on the ultimate question of whether *Ragsdale* disposes of Hibbs' claim[s]." (U.S. Opp. 13). The United States' failure to conclude that Hibbs' claims are meritless contradicts its suggestion that they are clearly barred by *Ragsdale*. Moreover, Hibbs has offered numerous reasons why *Ragsdale* is distinguishable that the United States has not addressed. (Opp. 12 n.13). It thus is impossible for any party

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[6] *See, e.g., EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *J.E.M. Ag. Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124 (2001); *Arkansas v. Sullivan*, 532 U.S. 769 (2001); *Bartnicki v. Vopper*, 532 U.S. 514 (2001); *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

to state with certainty how the lower court will rule on the issue.

b. This is merely prelude, however, to the more basic reason why the constitutional avoidance argument, in general, is flawed: it relies on an erroneous view of sovereign immunity. Contrary to what the United States (and Hibbs) suggests, the purpose of the Eleventh Amendment is not simply to protect the States' treasuries from damage awards and litigation costs but "to accord the States the respect owed them as joint sovereigns." *S.C. State Ports Auth.*, No. 01-46, slip op. at 20. As part of that respect, States have a "privilege not to be sued" *even on trivial claims*. *Puerto Rico Aqueduct*, 506 U.S. at 146 n.5. Accordingly, whether Nevada is entitled to sovereign immunity is a question, like subject matter jurisdiction, that precedes, and is independent of, any merits question.[7] *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89-102 (1998). Denying review, moreover, would not "avoid" the constitutional question but would force Nevada to litigate the merits of Hibbs' § 2612(a)(1)(C) claim, thereby *causing* the very constitutional injury at issue. The United States' argument, indeed, places Nevada in the bizarre position of having *to defend* Hibbs' claim in order to preserve its privilege to *avoid* having to defend against it.

c. The United States' reliance (U.S. Opp. 14-15) on a footnote in *Garrett* for the proposition that the Court does not review immunity issues relating to claims of questionable

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[7] The United States suggests in a footnote (U.S. Opp. 15 n.5) that, even though sovereign immunity generally limits a court's jurisdiction, it does not (like subject matter jurisdiction) prevent a court from considering a claim's merit because it is waivable. While a State's waiver of sovereign immunity may eliminate the Eleventh Amendment's jurisdictional impediment, immunity undoubtedly operates like any other limit on subject matter jurisdiction where, as here, it is *not* waived. *See Alden*, 527 U.S. at 730; *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 119-20 (1984).

merit is misplaced. *See* 531 U.S. at 360 n.1. In the cited footnote, the Court explained that it would decide whether Title I of the Americans with Disabilities Act was valid Section 5 legislation but declined to review the validity of Title II. Although the parties had briefed the latter issue and the question presented arguably encompassed it, the Court explained that no one had even attempted to demonstrate how Title II was implicated on the facts alleged. And nothing in the lower court's decision indicated that it was. To be sure, *Garrett* would preclude Nevada from seeking review of the question "Does the FMLA abrogate sovereign immunity?" and then briefing whether § 2612(a)(1)(D), the sick leave provision, is constitutional without explaining how that provision is even implicated. But it says nothing about cases where, as here, all (including the lower courts) agree that a provision governs the conduct at issue, and the question is whether a claim under it is barred by immunity.

7. For many of the same reasons, respondents err by suggesting (Opp. 13-18; U.S. Opp. 15-18), that a *separate* claim for retaliation based on a *separate* provision of the FMLA and a *separate* claim under *Ex parte Young* somehow "avoid" (or alternatively "moot") a claim of immunity on the *independent* FMLA provision at issue here. The respondents' theory (Opp. 12; U.S. Opp. 16) is that the State will have to defend against litigation anyway so there is no "practical" benefit to the State's assertion of immunity. Just stating the argument demonstrates its flaws. Namely, like the constitutional avoidance point, this argument ignores that Nevada has a privilege *not to be sued* under § 2612(a)(1)(C), not just a right to avoid the cost of litigation. *See supra* pp. 6-7.

Presumably for this reason, the Court rejected the same argument by the United States earlier this Term. The United States opposed the petition in *South Carolina State Ports Authority*, in part, on the ground that the State would still be subject to suit under *Ex parte Young*, and thus the lower

court's sovereign immunity decision would have "little practical effect" on the State's treasury or its regulatory burden. *S.C. State Ports Auth.* Opp. at 20-21. The Court not only granted *certiorari* over this objection but explained that these "practical" considerations have nothing to do with the "primary function" of immunity. *S.C. State Ports Auth.*, slip op. at 20. Consistent with the *South Carolina* case, the Court has repeatedly reviewed decisions rejecting a State's assertion of sovereign immunity on one claim even though additional proceedings against it (or its officers) on a different claim were certain.[8]

With respect to Hibbs' lengthy "First Amendment retaliation theory" (Opp. 13-17), the argument is a transparent attempt to cloud this case with irrelevant, last-minute arguments. Hibbs' opposition is *the first time* this theory has ever been advanced in this litigation. This is not surprising. *None* of the many courts addressing whether the FMLA abrogates immunity has hinted that the First Amendment offers a constitutional footing for the legislation. And the Ninth Circuit has suggested that a retaliation claim *cannot* be asserted against a State if it is immune from suit for the underlying act, which is apparently why no party separately addressed the retaliation argument below. *See Demshki v. Monteith*, 255 F.3d 986, 988-89 (9th Cir. 2001).

8. Respondents offer only a tepid defense of the lower-court's decision. They nowhere explain how the Ninth Circuit's analysis can be squared with *Morrison*, *City of Boerne*, or *Katzenbach*. (Pet. 18-19). Indeed, the United States fails to cite *Morrison* or *Katzenbach*, while Hibbs miscasts *Morrison* as holding only that the Violence Against Women Act was "directed at private persons" (Opp. 27 n.28),

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[8] *See Garrett*, 531 U.S. at 362 n.2; *City of Boerne*, 521 U.S. at 512; *Edelman v. Jordan*, 415 U.S. 651, 664 (1974); *Fitzpatrick*, 427 U.S. at 451 n.7; *see also Seminole Tribe* (deciding Eleventh Amendment question prior to *Ex parte Young* issue).

when the Court also held that the Act was not appropriate Section 5 legislation. *See Morrison*, 529 U.S. at 625-26. And they never come to grips with the fact that § 2612(a)(1)(C) is not a remedy to discrimination—it does not require equality—but is *a substantive benefit*.

Under this Court's precedent, Section 5 remedies are permitted only in response to specific unconstitutional state conduct and must be congruent and proportional to that conduct. (Pet. 15-18). Here, Congress failed to identify *any* unconstitutional state conduct that would justify § 2612(a)(1)(C). To the contrary, the FMLA's history details and commends state family leave policies. (Br. 7-11). In light of this, respondents' contrary story, which pieces together unrelated snippets of history, is simply unpersuasive.[9] In addition, respondents cannot explain how the FMLA's required benefit of twelve weeks of leave is congruent and proportional to any unconstitutional conduct. If, as respondents suggest, § 2612(a)(1)(C) is a response to practices States have already outlawed, it cannot be understood as proportional to *anything*. Hibbs hints that this benefit is necessary to remedy the disparate impact caused by no-leave policies (Opp. 24), but again, there is nothing in the FMLA's legislative history, or even respondents' briefs, demonstrating that States failed to implement family leave as part of some purposeful discrimination. Accordingly, for these, and the reasons stated in the State *amici* brief, there is no basis for concluding that § 2612(a)(1)(C) is appropriate Section 5 legislation.

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[9] For the reasons stated in the State *amici* brief and Petition (Br. 14-18; Pet. 18-20), respondents' attempt to revive the Ninth Circuit's burden-shifting analysis is unpersuasive, and the United States' reliance (U.S. Opp. 21) on the "Purposes" section of the FMLA is misplaced. (Br. 11-13).

CONCLUSION

The petition should be granted or the decision of the court of appeals summarily reversed.

Respectfully submitted,

CHARLES HILSABECK
(*Counsel of Record*)
Deputy Attorney General
STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL
1325 Airmotive Way, Ste. 340
Reno, Nevada 89502
(775) 688-1818

TRACI L. LOVITT
LOUIS A. CHAITEN
JONES, DAY, REAVIS & POGUE
222 East 41st Street
New York, NY 10017
(212) 326-3939

Counsel for Petitioners

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